STATE OF MICHIGAN

COURT OF APPEALS

EDMUND MANSER,

Plaintiff-Appellant,

v

FELPAUSCH FOOD CENTERS,

Defendant-Appellee.

UNPUBLISHED
August 11, 2005

No. 253595
Jackson Circuit Court
LC No. 03-002719-NO

Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff Edmund Manser appeals as of right the trial court's order granting defendant Felpausch Food Centers' motion for summary disposition under MCR 2.116(C)(10) in this premises liability case. We affirm. We decide this case without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

Manser slipped in a pool of dish soap at the end of a checkout lane in a Felpausch store. He filed suit, alleging that Felpausch breached its duty to maintain the premises in a reasonably safe condition and to warn of the unsafe condition. Felpausch moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that it had no duty to Manser because the condition was open and obvious, that no special aspects made the condition unreasonably dangerous in spite of its open and obvious nature, and that no evidence showed that it had actual or constructive notice of the condition. The trial court agreed and granted the motion.

II. Summary Disposition

A. Standard Of Review

We review de novo a trial court's decision on a motion for summary disposition.[1]

[1] *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

B. Establishing Negligence

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages.[2] A prima facie case of negligence may be based on legitimate inferences, provided that sufficient evidence is produced to take the inferences "out of the realm of conjecture."[3]

C. The Open And Obvious Doctrine

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land; however, this duty does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself.[4] Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection.[5] If special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous.[6]

A storekeeper must provide reasonably safe aisles for customers. In a premises liability action, a plaintiff must show either that the defendant caused the unsafe condition, or that the defendant knew or should have known of the unsafe condition. Such knowledge may be inferred from evidence that the condition existed for a sufficient length of time for the storekeeper to have discovered it.[7]

Manser testified that after he fell, he noticed a large puddle of light blue dish soap on the floor at the end of a checkout lane. He did not indicate that he had any difficulty seeing the substance after he fell.[8] We conclude that the trial court did not err in finding that no question of

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[2] *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

[3] *Berryman v K-Mart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992), quoting *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

[4] *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

[5] *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

[6] *Lugo v Ameritech Corp*, 464 Mich 512, 517-519; 629 NW2d 384 (2001).

[7] See *Berryman, supra*.

[8] Manser maintains that a question of fact existed as to whether the condition was open and obvious because he submitted an affidavit in which he stated that the liquid became clear when it spread over the floor. However, no such affidavit appears in the lower court file. In any event, a

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fact existed regarding whether the condition was open and obvious. There was no evidence that any special aspects made the condition unreasonably dangerous in spite of its open and obvious nature. The fact that Manser did not see the soap until after he fell is irrelevant.[9] Had Manser simply watched his step, any risk of harm would have been obviated.[10] The condition was not so unreasonably dangerous that it created a risk of death or severe injury.[11]

Further, no evidence showed that Felpausch had actual or constructive notice of the condition. No evidence showed how the soap came to be on the floor, or how long it had been on the floor. Manser's assertion that Felpausch knew or should have known of the condition is based on impermissible inference.[12] Manser presented no evidence to create a question of fact as to Felpausch's knowledge.[13] The trial court properly decided the issue as one of law and granted Felpausch's motion for summary disposition.[14]

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald

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party cannot create a question of fact by submitting an affidavit that contradicts earlier deposition testimony. See *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-257; 503 NW2d 728 (1993).

[9] See *Novotney, supra*.

[10] See *Spagnuolo v Rudds #2, Inc*, 221 Mich App 358, 360; 561 NW2d 500 (1997).

[11] Cf. *Lugo, supra* at 581; *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 6-7; 649 NW2d 392 (2002) (falling down several feet of ice-covered steps does not meet standard for unreasonable danger). This conclusion is reasonable notwithstanding the fact that Manser suffered a more severe injury than might be anticipated under the circumstances.

[12] *Ritter, supra*.

[13] *Berryman, supra*.

[14] See *Reeves v K-Mart Corp*, 229 Mich App 466, 480; 582 NW2d 841 (1998).